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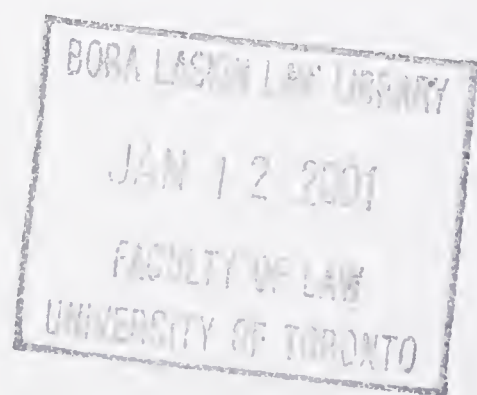
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LAW OF THE EUROPEAN CONSTITUTION

2001

VOLUME I

PROF. DE BURCA



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Law of the 'European Constitution' G.de Búrca

The aim of this seminar will be to introduce participants to European Union constitutional law, and to examine the emergence of an EC legal system and constitutional order. The changing scope and boundaries of the EU's spheres of action and competence will be explored, in considering the evolution of this supranational organization from a common market to an aspiring political union. Rather than concentrating on the economic law of the EU, and on the legal establishment and regulation of its internal market, the focus will instead be on the developments which have taken place beyond this 'common market core'.

By way of background reading, extracts from Josephine Shaw's Law of the European Union (2000) will be used for each session. In addition to this, specific materials will be assigned to focus the topic for discussion in each class. A copy of the Treaty on European Union (TEU) and the Treaty establishing the European Community (EC Treaty), as they currently stand before any of the amendments which will be effected by the draft Treaty of Nice (December 2000) will also be included in the materials. These treaties are the foundational documents of the European polity and establish the legal basis for its constitutional identity.

Session 1: The nature and origins of the EU

This class will examine the origins and nature of the European Union, which began as a limited coal and steel Community and subsequently a common market in the 1950s. The debate over the functions and direction of this organisation, as well as over its political and legal nature is as vigorous today as it has been for four decades. Apart from the economic and political tasks taken on by the Community, the specific legal character of the entity has remained a matter for discussion and dispute.

Shaw, pp 3-68

26/62 Van Gend en Loos [1963] ECR 1

6/64 Costa v. Enel [1964] ECR 585

J. Weiler 'The Community System: The Dual Character of Supranationalism' (1982) YBEL 267

Jean-Claude Piris, *Does the European Union have a Constitution? Does it need one?*, Harvard Jean Monnet Working Paper 5/00, p.1-15

J.H.H. Weiler and Ulrich R.Halter, "The Autonomy of the Community Legal Order – Through the Looking Glass", 37 *Harvard International Law Journal* (1996) 411, p.417-423

Session 2: The Union and its institutions

Two themes will be examined in this session. First, the explicit move from "Community" to "Union" and secondly the institutional structure of the EU and the legislative powers of its institutions. In this we will consider both the legal character of the polity as a whole, as well as the internal and horizontal division of powers between its component institutions.

Shaw pp 69-102

B. de Witte "The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?" (1999)

Shaw pp 107-163

Craig & de Búrca (EU Law, 1998) pp 130-161

ECJ, Case C-42/97, *European Parliament v Council*, judgment of 23 February 1999

Session 3: The scope and limits of Community powers

This class will look more closely at the 'horizontal' division of powers in the EC/EU, specifically at how policy competences are divided or shared between the European Union and the Member States. The principle of subsidiarity set out in Article 5 EC will be considered, and the tobacco advertising case will be used to consider the question which has become increasingly focused in recent years and months, ie whether we can identify concrete legal limits to the Community's powers. The treatment by the European Court of Justice of the 'residual powers' article of the EC treaty, Article 308 (formerly Art 235) in its Opinion on accession to the ECHR will also be considered in this light.

Shaw, pp 213-249

Case C-376/98 Germany v Parliament and Council, judgment of 5 October, 2000 and opinion of AG Fennelly in joined cases C-376/98 and C-74/99

A. Dashwood, The Limits of European Community Powers (1996) 21 ELRev 113

Opinion 2/94 on Accession by the Communities to the ECHR [1996] ECR I-1759

Session 4: Supremacy and direct effect of EC law in the national legal orders

The 'twin principles' of Community law which are seen as the constitutional core of its constitutional claims, in particular as articulated by the European Court of Justice (ECJ), are the principles of supremacy of EC law and its direct effectiveness (see the *Van Gend en Loos* and *Costa* cases from session 1). However, a less well-known aspect of the story concerns the reception of those initially radical doctrinal claims by the national legal systems and in particular by the national courts. In this session we will examine some of the later refinements by the ECJ of its doctrine, by limiting the application of the 'direct effect' doctrine and developing the notion of 'indirect' or interpretative effect in the *Marleasing* case. And secondly, we will examine some of the national reactions to the claims of supremacy and direct effect for EC law, in particular in the case brought before the German constitutional court (Bundesverfassungsgericht) by Brunner to challenge the ratification of the Maastricht Treaty in Germany.

Shaw pp 397-403, 422-458

C-91/92 Dori v Recreb [1994] ECR I-3325

C-106/89 Marleasing SA v CIA, [1990] ECR I-4135

J. Coppel 'Horizontal Effect of Directives' (1997) Industrial Law Journal 69-73

Brunner [1994] 1 CMLR 57 (89 BverfGE 155)

N. McCormick "The Maastricht-Urteil" (1995) ELJ 259

Alter, "Explaining National Court Acceptance of European Jurisprudence" in Slaughter et al, eds. The European Courts and National Courts, 1998, pp 227

Session 5: Human rights in the EU

The role and future of human rights within the EC legal and constitutional order will be explored in this class. Against the background of the gradual development by the ECJ of a 'human rights jurisprudence' (and see again Opinion 2/94 of the Court in the materials for Session 3) , the recent political decision to draft a Charter of Fundamental Rights for the EU, culminating in its adoption as a non-binding declaration at Nice in December 2000, will be examined.

P. Alston and J.H.H. Weiler "An Ever Closer Union in Need of a Human Rights Policy: The European Union and Human Rights" in The EU and Human Rights (P. Alston et al, eds. OUP, 1999)

J. Weiler "Does the European Union Truly Need a Charter of Rights?" (2000) ELJ 95

Final version of the Draft Charter of Fundamental Rights of the European Union, CHARTRE 4487/1/00, Brussels, October 2000

Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM(2000)644. October 2000

Session 6: Citizenship and equality in EU law

Continuing the theme of the evolution of the EU from a common market based on the principles of free trade and economic integration to a broader political and social entity, this class will look at the emergence at the time of the Maastricht Treaty in 1992/3 of a legal concept of European citizenship. Secondly, we will examine the related developments in the field of EC equality law, by considering the more recent evolution of the principle of market equality into a wider constitutional anti-discrimination norm.

Shaw, pp 370-383

G. More "The Principle of Equal Treatment: From Market Unifier to Fundamental Right" in *The Evolution of EU law* (P. Craig and G. de Búrca, eds, OUP 1999)

Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

Explanatory memorandum to Commission Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation COM(99)565

House of Lords, excerpts from Ninth Report of the Select Committee on the European Union, *EU Proposals to Combat Discrimination*

Session 7: the Treaty revision process

In this final session, the nature of the EU Treaty revision process (see Article 48 of the Treaty on European Union) will be examined in the light of current political developments. With a view to the expected eastwards enlargement of the EU over the next 5-10 years, an intergovernmental conference for the revision of the EU (and EC) Treaty has been taking place in the course of 2000. This has very recently led to a common accord at the European Council meeting in Nice, and the accord has now been turned into concrete Treaty amendments which will have to be ratified in each Member State of the EU according to their own constitutional arrangements. However, beyond the rather narrow and deliberately 'technical' agenda of Nice, a deeper political and academic debate has started on broader issues of the "constitutionalisation" of the EU legal order, which brings us back to some of the issues discussed in Session 1 of this course. The speech of the German Foreign Minister, Joschka Fischer, has been instrumental in launching this new constitutional debate, and the paper by Joseph Weiler is one of a

number of responses to Fischer's contribution. For those interested in reading other contributions to this debate, a symposium of papers on the subject has been posted on <http://www.law.harvard.edu/programs/JeanMonnet/>

P de Schoutheete, Editorial, The IGC, (2000) CMLRev 845

Extract from the Presidency Conclusions of the Cologne European Council, 3-4 June 1999

J Shaw, extract from "Process and Constitutional Discourse in the EU" (2000) Journal of Law and Society 4, 25-29

B de Witte "The Closest thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process"

Speech by Joschka Fischer "From Confederacy to Federation: Thoughts on the Finality of European Integration" 12 May 2000

J.H.H. Weiler "Fischer: the Dark Side", in Responses to Joschka Fischer: What Kind of Constitution for What kind of Polity? (RSC, 2000)

